Meridian Asset Management Sdn Bhd v Ong Kheng Hoe & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-19 OF 2008 (W)
ALAUDDIN PCA, AUGUSTINE PAUL AND MOHD GHAZALI FCJJ
21 DECEMBER 2009

Evidence — Privilege — Self-incrimination, against — Plaintiff obtained tracing order to locate whereabouts of its monies siphoned off by an employee — Order required employee and other co-defendants to depose affidavits giving detailed account of parties to whom the stolen funds were subsequently paid and the whereabouts of those funds — Court of Appeal ('COA') affirmed tracing order against employee but set it aside as against the other co-defendants on ground they had right to claim privilege against self-incrimination ('the privilege') — Whether COA's decision wrong — Whether the privilege did not apply as co-defendants were not witnesses giving evidence at trial — Evidence Act 1950, s 132 — Whether the privilege could not be invoked to escape revealing whereabouts of property of plaintiff in a proprietary claim

Evidence — Witness — Self-incrimination — Whether 'witness' in s 132 of the Evidence Act 1950 ('the EA') referred to a person who testified under oath or affirmation in a court of law or before a judicial tribunal and was subject to examination-in-chief, cross-examination and re-examination — Whether 'witness' in s 132 did not simply mean any person who could give or furnish evidence — Whether a person giving evidence by way of affidavit could not claim privilege against self-incrimination under s 132 of the EA

The appellant was an asset and fund manager which had appointed a company as the custodian of its clients' funds ('the custodian'). At all material times, the first respondent ('R1') was employed by the appellant as a central dealer. The appellant sued R1, his wife ('R2') and his two sisters ('R3' and 'R4') to recover RM27,606,169.65 ('the stolen funds') in addition to general damages for misappropriating the stolen funds which were managed by the appellant and deposited with the custodian. The appellant alleged that when confronted by the appellant's chief executive officer/managing director, R1 had confessed to misappropriating the stolen funds over a three to five year period and that he had deposited the monies in his own trading account as well as in various accounts belonging to R3 and R4. On the ground that R1 and R2 could not be located after R1's alleged confession and fearing that the respondents were attempting to abscond with the stolen funds, the appellant, by way of an ex-parte application, successfully obtained various reliefs from court including

an order directing each of the respondents to depose, file and serve an affidavit giving a detailed account of the parties to whom they had subsequently disbursed the stolen funds and the whereabouts of those funds ('the tracing order'). However, when the same application came up for hearing inter partes, the High Court set aside the tracing order. On the appellant's appeal, the Court of Appeal ('COA') set aside the High Court's discharge of the tracing order as against R1. The discharge of the tracing order as against the remaining respondents was affirmed on the ground they were entitled to claim privilege against self-incrimination. With respect to R1, the COA found that the tracing order did not increase his risk of being exposed to a criminal charge since he was already charged for several counts of cheating and falsification of documents and his properties had been seized in connection with suspected money-laundering offences; whereas the court had no such similar information with regard to the other respondents. The appellant was granted leave to appeal to the Federal Court against that part of the COA's decision affirming the High Court's discharge of the tracing order with respect to the second to the fourth respondents. At the appeal hearing, the Federal Court was asked to rule on which one of two competing rights should predominate in the instant case — the equitable proprietary right of a victim of a breach of trust to trace its assets with the aid of a Mareva injunction or a defendant's common law right to claim privilege against self-incrimination. The court was also asked to rule whether s 132 of the Evidence Act 1950 ('the EA') could apply to the second to the fourth respondents and whether they could be considered as 'witnesses' under that section in view of conflicting High Court decisions on the point.

Held, allowing the appeal:

(1) The judgment of the COA in the instant appeal was flawed for two reasons: (a) the privilege against self-incrimination did not apply as the persons who sought to invoke it, ie the respondents, were not witnesses giving evidence at a trial but were simply defendants in an action against whom a proprietary claim was made. The view that 'witness' in s 132 of the EA referred to a person who testified under oath or affirmation in a court of law or before a judicial tribunal and who was liable to be examined, cross-examined and re-examined, was the correct position. The contrary view that 'witness' meant any person who could give or furnish evidence and not any person who testified in the witness box was incorrect; and (b) the appellant's claim was proprietary in nature and it sought to recover its money which it alleged was wrongfully in the hands of the respondents. As owner of a beneficial interest in the property, the appellant was entitled both at law and in equity to trace the property, whether or not it had changed its character from moveable to immoveable or vice-versa, into the hands of all persons who had come by it and to seek and obtain specific relief to either preserve or recover the property in question (see paras 26–28).

(2) It was positively unjust for a defendant to be able to plead crimination to escape revealing the whereabouts of the plaintiff's property which he had no business to have in his possession in the first place. As such, the so-called privilege, if any, must yield to a plaintiff's proprietary claim (see para 32).

(3) A defendant in proceedings for tracing of property could not refuse to disclose relevant and vital information which was in his or her possession or power. In the instant appeal, there was no foundation whatsoever to base a claim to privilege against self-incrimination. There was at all material times a fiduciary relationship between the appellant and R1. The other respondents were merely recipients of trust property. The claim to privilege against self-incrimination was irrelevant as it was inapplicable to a claim by the owner of property to his property. Accordingly, the second to the fourth respondents had to respectively by way of affidavit provide a detailed account of to whom and where the stolen funds had subsequently been disbursed to (see para 34).

[Bahasa Malaysia summary

Perayu adalah pengurus aset dan dana yang mana telah melantik sebuah syarikat sebagai penjaga dana pelanggan-pelanggannya ('penjaga'). Pada kesemua masa material, responden pertama ('R1') diambil bekerja oleh perayu sebagai peniaga pusat. Perayu menyaman R1, isterinya ('R2') dan kedua-dua saudara perempuannya ('R3' dan 'R4') untuk mendapatkan semula wang sejumlah RM27,606,169.65 ('dana yang dicuri') sebagai tambahan kepada ganti rugi am kerana menyalahguna dana yang dicuri yang mana diuruskan oleh perayu dan didepositkan dengan penjaga. Perayu mendakwa bahawa apabila R1 berhadapan dengan ketua pegawai eksekutif/pengarah urusan perayu, R1 telah mengaku menyalahguna dana yang dicuri selama tiga hingga lima tahun dan bahawa dia telah mendepositkan wang tersebut dalam akaun niaganya sendiri dan juga pelbagai akaun yang dimiliki oleh R3 dan R4. Atas alasan tersebut R1 dan R2 tidak dapat dicari selepas dakwaan pengakuan R1 dan takut bahawa responden-responden mencuba untuk melarikan dana yang dicuri, perayu, melalui permohonan ex parte, berjaya mendapatkan pelbagai relief daripada mahkamah termasuk perintah mengarahkan setiap responden untuk mendepos, fail dan menyerahkan afidavit dengan memberikan akaun terperinci pihak-pihak mana yang mereka lepaskan dana yang dicuri dan di mana dana tersebut ('perintah mengesan'). Walau bagaimanapun, apabila permohonan yang sama masuk untuk pendengaran inter partes, Mahkamah Tinggi mengenepikan perintah mengesan tersebut. Atas rayuan perayu, Mahkamah Rayuan ('MR') mengenepikan pelepasan perintah mengesan oleh Mahkamah Tinggi terhadap R1. Pelepasan perintah mengesan tersebut terhadap responden-responden yang lain adalah disahkan atas alasan yang mereka berhak untuk menuntut keistimewaan perlindungan dari terlibat dari jenayah. Berkaitan R1, MR mendapati bahawa perintah mengesan tersebut

A tidak meningkatkan risikonya daripada terdedah kepada tuduhan jenayah memandangkan dia telah dituduh untuk beberapaa kesalahaan menipu dan mempalsukan dokumen dan hartanahnya telah dirampas berhubung dengan kesalahan pengubahan wang haram yang disyaki; sementara mahkamah tidak mempunyai maklumat yang sama sedemikian berkaitan kepada
B responden-responden yang lain. Perayu diberikan izin untuk merayu kepada Mahkamah Persekutuan terhadap bahagian keputusan MR tersebut yang mengesahkan pelepasan perintah mengesan oleh Mahkamah Tinggi berkaitan kepada responden kedua hingga keempat. Pada pendengaran rayuan,
C Mahkamah Persekutuan diminta untuk memutuskan atas yang mana satu daripada hak bersaing patut mempunyai kuasa dalam kes ini — hak ekuiti tuan punya mangsa pecah amanah untuk mengesan asetnya dengan bantuan injunksi Mareva atau hak common law defendan untuk menuntut keistimewaan perlindungan dari terlibat dari jenayah. Mahkamah juga
D diminta untuk memutuskan ama ada s 132 Akta Keterangan 1950 ('AK') boleh digunapakai kepada responden kedua hingga keempat dan sama ada mereka boleh dipertimbangkan sebagai 'witnesses' di bawah seksyen tersebut dalam mengambil kira keputusan Mahkamah Tinggi yang bercanggah atas poin tersebut.

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Diputuskan, membenarkan rayuan:

(1) Penghakiman MR dalam rayuan ini adalah cacat kerana dua sebab: (a) keistimewaan perlindungan dari terlibat dari jenayah tidak boleh digunapakai kerana orang-orang yang memohon untuk
F membangkitkannya, iaitu responden-responden, bukan saksi-saksi yang memberikan keterangan semasa perbicaraan tetapi adalah hanya defendan-defendan dalam tindakan terhadap siapa tuntutan tuan punya dibuat. Pandangan bahawa 'witness' dalam s 132 AK merujuk kepada orang yang memberi keterangan dengan bersumpah atau pengesahan di
G mahkamah undang-undang atau di hadapan tribunal kehakiman dan yang bertanggungjawab untuk diperiksa, memeriksa balas dan diperiksa semula, adalah kedudukan betul. Pandangan bertentangan bahawa 'witness' bermaksud mana-mana orang yang boleh memberi atau mengemukakan keterangan dan bukan mana-mana orang yang memberi
H keterangan dalam kandang saksi adalah tidak betul; dan (b) tuntutan perayu adalah bersifat ketuanpunyaan dan ia memohon untuk mendapatkan semula wangnya yang didakwa secara salah berada dalam milikan responden-responden. Sebagai pemilik benefisiari dalam hartanah tersebut, perayu berhak dari segi undang-undang dan ekuiti
I untuk mengesan hartanah, sama ada atau tidak ia telah menukar sifatnya daripada boleh alih ke tak boleh alih atau sebaliknya, kepada kesemua orang yang mendapatnya dan untuk memohon dan mendapatkan relief spesifik kepada sama ada menjaga atau mendapatkan semula hartanah yang dipersoalkan (lihat perenggan 26–28).

(2) Ia adalah tidak adil secara positif untuk defendan dapat memplid pelucutan untuk melarikan diri daripada mendedahkan di mana hartanah plaintif berada yang dia tidak mempunyai urusan untuk mempunyai dalam milikannya pada mulanya. Oleh itu, keistimewaan sedemikian, jika ada, mesti tunduk kepada tuntutan ketuanpunyaan plaintif (lihat perenggan 32).

(3) Defendan dalam prosiding untuk mengesan hartanah tidak boleh menolak untuk mendedahkan maklumat relevan dan penting yang berada dalam milikan atau kuasanya. Dalam rayuan ini, tidak terdapat asas langsung untuk mendasarkan tuntutan kepada keistimewaan perlindungan dari terlibat dari jenayah. Terdapat pada kesemua masa material hubungan fidusiari di antara perayu dan R1. Responden-responden yang lain hanya penerima hartanah amanah tersebut. Tuntutan kepada keistimewaan perlindungan dari terlibat dari jenayah adalah tidak relevan kerana ia tidak boleh digunapakai kepada tuntutan oleh pemilik hartanah kepada hartanahnya. Oleh itu, responden kedua hingga keempat perlu masing-masing melalui afidavit memberikan akaun terperinci kepada siapa dan di mana dana yang dicuri telah dilepaskan kemudiannya (lihat perenggan 34).]

Notes

For cases on against self-incrimination, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2862–2870.

For cases on self-incrimination, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3690–3691.

Cases referred to

AT & T Istel Ltd and another v Tully and others [1992] 3 All ER 523, HL (refd)

A and another v C and others [1980] 2 All ER 347, HL (refd)

Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal [1995] 2 MLJ 620; [1995] 3 CLJ 35, CA (refd)

Bankers Trust Co v Shapira and others [1980] 3 All ER 353, CA (refd)

Khan v Khan [1982] 2 All ER 60, CA (refd)

Meridian Asset Management Sdn Bhd v Ong Kheng Hoe & Ors [2008] 3 MLJ 184; [2008] 5 CLJ 165, CA (refd)

PMK Rajah v Worldwide Commodities Sdn Bhd & Ors [1985] 1 MLJ 86 (refd)

Rank Film Distributors Ltd and others v Video Information Centre and others [1982] AC 380, HL (refd)

Riedel-de Haen AG v Liew Keng Pang [1989] 2 MLJ 400, HC (refd)

Television Broadcasts Ltd & Ors v Mandarin Video Holdings Sdn Bhd [1983] 2 MLJ 346; [1983] 1 LNS 32 (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
Evidence Act 1950 ss 2, 132
Forgery Act 1913 [UK]
Penal Code ss 420, 471
Securities Commission Malaysia Act 1993
Securities Industry Act 1983 (repealed by Capital Markets and Services Act 2007)
Theft Act 1968 [UK]

Appeal from: Appeal No W-02–1204 of 2006 (Court of Appeal, Putrajaya)

Gideon Tan (YC Chin with him) (Gideon Tan Razali Zaini) for the appellant.
Kamarul Hisham Kamaruddin (Kamarul Hisham & Hasnal Rezua) for the respondent.

Mohd Ghazali FCJ:

[1] On 7 July 2008 this court granted the applicant (the plaintiff in the originating action) leave to appeal against part of the decision of the Court of Appeal in Civil Appeal No W-02–1204 of 2006 on the following questions:

(a) whether the privilege against self-incrimination under the common law outweighs the equitable right for one to recover his own assets; and/or

(b) whether a defendant is entitled to invoke privilege against selfincrimination and not to reveal whereabouts the monies he has misappropriated when opposed with a Mareva injunction order to trace those monies.

THE BACKGROUND

[2] The plaintiff is a locally incorporated company and is in the business of asset and fund management. In the course of its business, the plaintiff manages portfolios for large insurance or pension funds, unit trusts and other institutional and high network clients wherein they would invest such funds seeking to obtain maximum returns or profits on such funds for their clients. The company earns a management/professional fee for such specialist fund management services.

[3] In the conduct of its business, the plaintiff appointed Arab Malaysian Trustees Bhd ('the custodian') pursuant to a trustee/custodian services agreement to act as custodian over the plaintiff's clients' funds and to provide certain administrative functions on behalf of the plaintiff. All investment

decisions pertaining to the funds and/or any dealing with the funds in the custody of the custodian are undertaken on the plaintiff's instructions. A

[4] The first defendant was an employee of the plaintiff since March 1996. In March 2004, he was transferred to the plaintiff's central dealing department and held the post of central dealer. The job description and duties of the first defendant as central dealer included the following: B

(a) collating all trade orders and allocations from the fund managers;

(b) checking and updating positions; C

(c) checking cash availability of each portfolio together with the fund managers;

(d) placing orders and getting confirmation with brokers; and

(e) liaising with the back office on confirmed trade transactions. D

[5] It is the plaintiff's case that as its employee, the first defendant owes a duty of good faith and fidelity to the plaintiff. Furthermore, the first defendant is said to owe a duty to the plaintiff not to use the resources, assets and confidential information of the plaintiff or its clients for personal gain. E

THE SUIT

[6] On 26 September 2005, the plaintiff filed this action against the first to the fourth defendants. The second defendant is the wife of the first defendant and the third and fourth defendants are the sisters of the first defendant. F

[7] In its statement of claim, the plaintiff averred that in breach of the duties mentioned earlier, the first defendant fraudulently utilised, converted, stole and misappropriated funds managed by the plaintiff which were deposited with the custodian amounting to approximately RM27,606,169.65 ('the stolen funds'). G

[8] The modus operandi of the first defendant, according to the statement of claim, was as follows: H

(a) the first defendant would forward false instructions to the custodian with such instructions containing forged signatures of the plaintiff's chief executive officer/managing director; I

(b) the said false instructions instruct the custodian to forward the stolen funds to a company called TA Futures Sdn Bhd;

(c) the stolen funds received by TA Futures Sdn Bhd would be credited to the personal trading accounts of the first, third and fourth defendants and/or other persons unknown to the plaintiff; and

(d) the stolen funds or proceeds from the utilisation of the stolen funds are then forwarded to various other bank accounts, futures brokers, stock broking firms and asset management companies in Malaysia and Singapore held in the names of the first, third and fourth defendants and/or other persons unknown to the plaintiff.

[9] The plaintiff averred that on or about 25 August 2005, one Nicholas Ng, the plaintiff's chief executive officer/managing director confronted the first defendant over the stolen funds. The first defendant confessed and admitted that he, inter alia, had remitted monies totalling approximately RM27,606,169.65, over a period of three to five years, from the custodian to his own trading account at TA Futures Sdn Bhd and other various accounts belonging to the third and fourth defendants for his own personal benefit and/or the benefit of the third and fourth defendants. He also confessed that he forged the said Nicholas Ng's signature to instruct the transfer of funds from the custodian.

[10] The plaintiff then averred that the third and fourth defendants have colluded, conspired and assisted the first defendant in the misappropriation or fraudulent utilisation of the plaintiff's clients' funds and that under such circumstance, the third and fourth defendants having in their possession money had and received as a result of the fraudulent transactions carried out by the first defendant, have been unjustly enriched from the fraudulent transactions.

[11] After the said confrontation, the plaintiff's attempts to contact the first defendant directly and also through the second defendant proved futile. It is the plaintiff's belief that the first and second defendants are attempting to abscond with the monies derived from the stolen funds.

[12] It is the plaintiff's claim that by reason of the aforesaid matters, it has suffered loss and damage in the amount of approximately RM27,606,169.65 and/or any damages resulted thereon and prayed for the following:

(a) RM27,606,169.65;

(b) general damages; and

(c) interest and costs.

[13] In their statement of defence, the defendants contended as follows:

(a) the first defendant claimed that the plaintiff's chief executive officer gave the instructions to the custodian for trades;

(b) that the custodian cannot take orders from the first defendant and that the plaintiff never delegated such powers to the first defendant;

(c) that all trades are within the knowledge of the plaintiff's chief executive officer;

(d) that all the defendants are made scapegoats; and

(e) that all the defendants do not wish to plead all accusations and raise 'privilege to self-incrimination'.

THE TRACING ORDER

[14] By summons in chambers ex parte dated 26 September 2005 the plaintiff applied for, inter alia, the following orders:

(a) that all the defendants be restrained from removing or in any way dispose of or deal with or diminish the value of their assets within the court's jurisdiction whether in their own name or not and whether solely or jointly owned up to the value of RM27,606,169.65;

(b) that all the defendants be restrained from removing or in any way dispose of or deal with or diminish the value of their assets whether they are within the court's jurisdiction or outside of the court's jurisdiction, whether in their own name or not and whether solely or jointly owned up to value of RM27,606,169.65;

(c) that all the defendants shall forthwith inform the plaintiff's solicitors in writing of all their assets whether within or outside the court's jurisdiction, whether in their own name or not and whether solely or jointly owned, giving value, location and details of all such assets and the information so provided must be confirmed by way of an affidavit to be filed and served within seven days after this order has been served;

(d) notwithstanding para (a) and (b) above, all the defendants shall be allowed a sum of RM1,500 per month respectively for ordinary living expenses provided that the defendants notify the plaintiff's solicitors in writing of the source of the sum of RM1,500 before spending any money;

(e) notwithstanding para (d) above, the defendants may apply to this court at any time to vary the amount stated in para (d) above, but anyone wishing to do so must inform the plaintiff's solicitors;

(f) that all the defendants respectively shall by way of an affidavit to be filed and served seven days after this order has been served provide a detailed account of to whom and where the sum of RM27,606,169.65 was subsequently disbursed to; and

(g) the list of institutions which are listed in Schedule 1 to this application shall forthwith provide details of the accounts of the defendants, their nominees and/or agents, of any payment in and payment out, full particulars and copies of all transactions made by the defendants, their nominees and/or agents since beginning of the year 2000.

[15] Schedule 1 to the application read as follows:

Particulars of accounts held by the first defendant

(i) Hong Leong Bank Bhd — a/c No. 00100179831;

(ii) HSBC Bank (M) Bhd — a/c No. 301–341764–028;

(iii) Okachi (M) Sdn Bhd — a/c No. MK0088;

(iv) Okachi (M) Sdn Bhd — a/c No. K0088;

(v) TA Futures Sdn Bhd — a/c No. C30128;

Particulars of accounts held by the third defendant

(i) Okachi (M) Sdn Bhd — a/c No. MK0088;

(ii) Okachi (M) Sdn Bhd — a/c No. K0088;

(iii) HSBC Bank (M) Bhd — a/c No. 301–822219–107;

(iv) TA Futures Sdn Bhd — a/c No. GEL333;

Particulars of accounts held by fourth defendant

TA Futures Sdn Bhd — a/c No. C30888.

[16] The reasons for the application were stated as follows:

(a) that the first defendant has confessed to the plaintiff that he has misappropriated the money belonging to the plaintiff's clients;

(b) that the first and second defendants could not be located after the first defendant confessed that he has misused his position with the plaintiff and misappropriated money and that there is a real risk that the first and second defendants would abscond with the money previously misappropriated; and

(c) that the first defendant has breached his duty as an employee to the plaintiff by misusing the money of the plaintiff's clients.

[17] The learned judge of the High Court granted the orders prayed for in the summons in chambers.

[18] Subsequently, when the matter was heard inter partes, the learned judge set aside para (f) of the order, namely, that all the defendants shall by way of an affidavit provide a detailed account of the persons to whom the monies were disbursed and the whereabouts of the sum of RM27,606,169.65 ('the tracing order'). The plaintiff appealed to the Court of Appeal.

JUDGMENT OF THE COURT OF APPEAL

[19] The Court of Appeal allowed the appeal in part, namely, the order of the High Court relating to the discharge of the tracing order was set aside in respect of the first defendant but that the order remains effective against the second to the fourth defendants. In delivering the judgment of the Court of Appeal (see *Meridian Asset Management Sdn Bhd v Ong Kheng Hoe & Ors* [2008] 3 MLJ 184; [2008] 5 CLJ 165), James Foong JCA (as he then was) said (at p 187(MLJ); 168(CLJ)):

> We believed it was based on the claim by the defendants that they are entitled to the privilege against self-incrimination ie that by disclosing what is requested of them in the tracing order may criminate them to criminal offence.

[20] The Court of Appeal accepted that 'this privilege against self-incrimination survives in our common law'. At pp 169–170 James Foong JCA said:

> Accepting that this privilege against self-incrimination survives in our common law, and the exception to this as provided in s 132(1) of the Evidence Act 1950 is not applicable to the defendants since they are not considered as 'witnesses' within the meaning of this section — see *PMK Rajah v Worldwide Commodities Sdn Bhd & Ors* [1985] 1 MLJ 86 and *Riedel-de Haen AG v Liew Keng Pang* [1989] 2 MLJ 400), the appellant urged us to accept and apply the test enunciated in *Khan v Khan* [1982] 2 All ER 60, to ascertain whether such privilege applies to the defendants.
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> The test laid down in *Khan v Khan* can be derived from the judgments of Stephenson LJ and Griffiths LJ when they dismissed the appeal before them. Stephenson LJ said:
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> > So far I have assumed that compliance with the order would tend to expose the first defendant to the risk of criminal proceedings or would materially increase that risk. But I do not consider that the first defendant is entitled to the benefit of so unrealistic an assumption ... He would already be exposed to the risk of criminal proceedings for theft and perhaps forgery, and what he may have to say about the subsequent disposal of the £40,000 adds nothing of substance to that existing risk.
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> Griffiths LJ added:

> For the purposes of assisting the plaintiff to trace the money it is of the utmost importance that the first defendant should be required to swear an affidavit setting out what has become of it since it entered the account of his company. As the first defendant admits that he paid the £40,000 to the second defendant company, any information that he can give about the subsequent whereabouts or use of the money cannot add a pennyweight to the strength of the criminal case against him. Accordingly, in my opinion to require him to swear the affidavit in the form ordered by the judge would not tend to incriminate him either in the sense of setting up a case against him or strengthening an already existing case.
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> In essence, this proposition amounts to this: if there is evidence that the defendant is already exposed to the risk of criminal proceeding then the demand for disclosure under the tracing order could not materially add to the existing risk faced by the defendant; thus such privilege would not apply. We find this proposition rational for application to this instant case. Further, we are of the view that there should be no distinction in the application of this proposition in an application for a tracing order made under a Mareva injunction with that made with an Anton Pillar order.

[21] The factual background to *Khan v Khan* [1982] 2 All ER 60 as set out in the head note to that case is that the plaintiff gave blank signed cheques to the first defendant, allegedly for the purpose of paying the balance of the purchase price of a property which the plaintiff was acquiring and for incidental expenses. The first defendant made out one of the cheques for £40,000 payable to the second defendant, a company controlled by him. The proceeds of the cheque were paid into the second defendant's account at the third defendant, a bank. Subsequently all or part of the £40,000 was removed from the account and used for other purposes. The plaintiff brought an action against the defendants seeking the replacement of the £40,000, damages for breach of trust, disclosure of the whereabouts of the £40,000 and an account of how it had been applied. No defence to the action was served but the first defendant's solicitors alleged in a letter to the plaintiff's solicitors that the plaintiff had lent the £40,000 to the first defendant. The plaintiff obtained ex parte a tracing order requiring the first defendant personally and the second defendant by its directors to swear affidavits setting out full details of the facts and matters within their knowledge concerning the whereabouts and application of the £40,000. The defendants applied to have the order discharged or varied but the judge refused their application. The defendants appealed to the Court of Appeal, submitting that if they complied with the tracing order the first defendant would incriminate himself of offences under both the Theft Act 1968 and the Forgery Act 1913. The Court of Appeal upheld the tracing order and dismissed the appeal for the reasons discussed earlier.

[22] In the instant appeal before this court, James Foong JCA then noted the following information from the submission of the defendants in the High Court, namely:

(a) that the first defendant has since the inception of the application to set aside the tracing order been charged with a total of 30 charges of cheating under s 420 of the Penal Code and 30 charges of using a forged document as genuine under s 471 of the Penal Code;

(b) that an investigation has commenced under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 wherein the police has proceeded to seize certain moveable and immoveable properties belonging to the first defendant, suspected to have been concerned in, or being the subject matter of, offences under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001; and

(c) that investigations has begun under the Securities Commission Malaysia Act 1993 and the Securities Industry Act 1983.

James Foong JCA then said (at pp 171–172):

> By these revelations, it is our view that what is requested of the first defendant in the tracing order does not increase his risk of being exposed to a criminal charge. The first defendant has already been charged for cheating and falsification of documents. On top of that, his properties had been seized on the suspicion that they were secured from monies derived from money laundering. Prior to this, the authorities had obtained information from him on the movement of his funds. Thus, what he has to disclose in this civil suit is nothing more than what he has already told the authorities who, possibly had used some of the information to frame the criminal charge against him or may even use them to support the filing of further charges. Therefore, the information requested by the plaintiff in the tracing order adds no further weight to what the first defendant is already exposed to. In short, his risk towards this impediment by the disclosure demanded has not materially increased.
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> However, on the other hand, we cannot say the same of the other defendants. They are not in same situation as the first defendant, or at least we have no knowledge of. There is no information of whether the second, third or fourth defendants were charged for any criminal offence or that their properties seized and information on the movement of their funds divulged to the authorities. All the information we have is of the first defendant. Very little is disclosed of these other defendants. In the light of this, we are of the view that the second, third and fourth defendants do risk self incrimination by the disclosure of the information demanded and such risk must be safeguarded.
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> For reasons aforesaid, we allow this appeal in part. The order of the High Court dated 18 October 2006 relating to the discharge of the tracing order is set aside in respect of the first defendant. This order remains effective against the other defendants.

JUDGMENT OF THIS COURT

[23] Since the first defendant did not appeal against the decision of the Court of Appeal, I would think that the only issue before this court is whether

A the Court of Appeal was correct in ruling that the second to the fourth defendants 'do risk self-incrimination by the disclosure of the information demanded and such risk must be safeguarded'.

B **[24]** In canvassing the appeal before this court, learned counsel for the plaintiff argued that the Court of Appeal was wrong in setting aside the tracing order against the second to the fourth defendants. Counsel submitted that the instant appeal is solely concerned with the question as to how a Malaysian court would balance the equitable proprietary rights of a victim of a breach of trust to trace his assets with the aid of a Mareva injunction as against a C defendant's common law right to privilege against self-incrimination. He also submitted that this remains a policy question to be determined by the court as to how these two rights should be weighed. He then pointed out that the Court of Appeal, following *Khan v Khan,* held that there was no real risk of D incrimination or material increase of an existing risk of incrimination against the first defendant given the circumstances of the case.

[25] Counsel then argued that the predicament which causes this appeal arises from the development of case law on s 132 of the Evidence Act 1950, E namely, that s 132, subject to certain conditions, removes a witness's privilege against self-incrimination and compels a witness to answer all questions asked during a trial. However, s 2 of the Evidence Act 1950 makes it clear that the provisions therein are not applicable to affidavits. As such, the said common law privilege would still apparently be available to the defendants herein when F being ordered to disclose the whereabouts of the monies siphoned by the first defendant and subsequently disbursed to the second to the fourth defendants.

[26] Counsel pointed out that this position is complicated by two conflicting High Court decisions in Malaysia. He then referred to *Television* G *Broadcasts Ltd & Ors v Mandarin Video Holdings Sdn Bhd* [1983] 2 MLJ 346 which held that the definition of 'witness' meant any person who could give or furnish evidence and not any person who testified in the witness box. Consequently he referred to *PMK Rajah v Worldwide Commodities Sdn Bhd & Ors* [1985] 1 MLJ 86 where the court adopted a more restrictive approach and H held that 'witness' simply means a person who testified on oath or affirmation in a court of law or in a judicial tribunal and who would be subject to examination-in-chief, cross-examination and re-examination. Counsel also referred to *Riedel-de Haen AG v Liew Keng Pang* [1989] 2 MLJ 400 where the Singapore High Court followed the House of Lords in *Rank Film Distributors* I *Ltd and others v Video Information Centre and others* [1982] AC 380 and adopted the more restrictive approach whilst the Court of Appeal in *Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal* [1995] 2 MLJ 620; [1995] 3 CLJ 35 did not discuss these two competing doctrines and that the judgment of the court seems to suggest that s 132 of the Evidence Act

1950 only applies to recording evidence in proceedings. Counsel then pointed out that there is yet any decision from this court as to whether the definition of 'witness' in s 132 of the Evidence Act 1950 should adopt the liberal interpretation or the narrow interpretation.

[27] I am of the view that there are two reasons why the judgment of the Court of Appeal in the instant appeal is fatally flawed. In the first place, the privilege of self-incrimination does not apply in this case as the persons who seek to invoke it, viz, the defendants are not witnesses giving evidence at a trial. They are simply defendants in an action against whom a proprietary claim has been made. The contrary view expressed by Chan J (as he then was) in *Television Broadcasts Ltd* is not correct. In my judgment, the correct position is that stated by Zakaria Yatim J (later FCJ) in *PMK Rajah* where he held that that 'witness' in s 132 of the Evidence Act 1950 refers to a person who testifies on oath or affirmation in a court of law or before a judicial tribunal and who is liable to be examined, cross examined and re-examined. I would add that in the Singapore case of *Riedel-de Haen AG,* Chan Sek Keong J (now CJ) appears to have preferred the view expressed by Zakaria Yatim J.

[28] In the second place, the claim by the plaintiff is proprietary in nature and it seeks to recover its money which it alleges is wrongfully in the hands of the defendants. It is now well settled that a claim to a beneficial interest in movable or immovable property is a proprietary claim. The owner of such property is entitled both at law and in equity to trace the property into the hands of all persons into whose hands it passes save two exceptions which are irrelevant for present purposes. The property may change its character from movable to immovable or vice versa. But that does not matter because the beneficial owner may trace his property into the product or substitute of the original property. And the beneficial owner may seek and obtain specific relief to either preserve or recover the property in question.

[29] A case which illustrates the vigour with which a court of equity ensures that its jurisdiction will not have been invoked in vain in claims by beneficiaries tracing their property into the hands of third persons is *A and another v C and others* [1980] 2 All ER 347. The facts are set out by Robert Goff J at p 349 as follows:

> The factual background of the case is that the plaintiffs claim to be the victims of a fraud which they say was master-minded by the first defendant, but which implicated the second, third, fourth and fifth defendants. They have placed before the court affidavit evidence which constitutes prima facie evidence that a fraud has been committed; though whether such a fraud may hereafter be proved depends on the effect of the evidence given at the trial of the action. In their writ, they are claiming against the first five defendants damages for conspiracy to defraud and damages for deceit, and against the fifth defendant damages for breach of warranty, in a sum of £5.7m. They are also claiming to trace a sum of £383,872.44 which they

say was paid, under a mistake of fact induced by the fraud, into an account at the sixth defendant's bank. There is no allegation of malpractice against the sixth defendant, simply a claim to trace money into its hands which the plaintiffs say is their property in equity.

[30] The writ was issued on 12 March 1980. On the same day, before the issue of the writ, the plaintiffs obtained ex parte an order which provided, inter alia, a Mareva injunction against the first five defendants limited to £1.5m, an order requiring all the defendants to disclose to the plaintiffs forthwith the sums at present standing in accounts in the names of any of the first five defendants or a person (referred to as WL) at the sixth defendant's bank and an order that if the sum of £383,872.44 is no longer in WL's account at the sixth defendant's bank each defendant disclose all facts within their knowledge as to the present whereabouts of that sum. Robert Goff J said (pp 350–351):

I take first the proprietary claim. In such cases, there is good authority that the court may make orders with the purpose of ascertaining the whereabouts of the missing trust fund. Thus in *London and County Securities Ltd v Caplan* (26th May 1978, unreported) in which the plaintiffs alleged that the defendant had defrauded them of about £5m, Templeman J made an order restraining the defendant from disposing or otherwise dealing with his assets, and in addition ordered that a certain bank (not a party to the action) by its servants or agents should forthwith produce or cause to be produced to the plaintiffs all statements or other documents relating to any account or accounts maintained by or on behalf of the defendant and cause the plaintiffs or their agents to take copies thereof. This latter order was made with the purpose of enabling the plaintiffs to trace property acquired by the defendant and so take steps to seize that property if it derived from their assets. The case was described by the judge as:

> ... a case of interlocutory relief granted to preserve the assets which are the subject of the litigation and are the subject of criminal proceedings. It is a case where, unless effective relief is granted, justice may well become impossible because the evidence and the fruits of crime and fraud may disappear.

Again in *Mediterranea Reffineria Siciliana Petroli SpA v Mabanaft GmbH* [1978] Court of Appeal Transcript 816, another case which was concerned with tracing the product of the plaintiff's assets, viz a cargo of oil, delivery of which was alleged to have been obtained without the production of bills of lading, Mocatta J granted an injunction restraining the disposal of the proceeds of sale of the cargo; but he also made a sweeping order requiring directors and an employee of the defendant company to make full disclosure of certain specified facts on affidavit, and directed that one of them should file an affidavit of documents. His order was upheld by the Court of Appeal. Lord Denning MR described Mocatta J's order as 'a very good and effective order so as to ascertain where the money has gone'. Templeman LJ said:

> It is a strong order but the plaintiff's case is that there is a trust fund of $3,500,000. This has disappeared; and the gentlemen against whom orders are sought may be able to give information as to where it is and who is in charge of it. A court of equity has never hesitated to use the strongest powers to protect and

> preserve a trust fund in interlocutory proceedings on the basis that, if the trust fund disappears by the time the action comes to trial, equity will have been invoked in vain. That is why orders of this sort were made long before the recent orders for discovery, and they are at the heart of the Chancery Division's concern, and it is the concern of any court of equity, to see that the stable door is locked before the horse has gone.
>
> Now these cases provide ample authority that, in an action in which the plaintiff seeks to trace property which in equity belongs to him, the court not only has jurisdiction to grant an injunction restraining the disposal of that property; it may in addition, at the interlocutory stages of the action, make orders designed to ascertain the whereabouts of that property. In particular, it may order a bank (whether or not party to the proceedings) to give discovery of documents in relation to the bank account of a defendant who is to give discovery of documents in relation to the bank account of a defendant who is alleged to have defrauded the plaintiff of his assets; and it may make orders for interrogatories to be answered by the defendants or their employees or directors.

[31] In *Bankers Trust Co v Shapira and others* [1980] 3 All ER 353, the Court of Appeal held that the court was entitled, for the purpose of giving effect to a defrauded plaintiff's equitable right to trace his money, to order a bank to disclose information relating to the account of a customer who was prima facie guilty of fraud even though the bank had not incurred any personal liability for the fraud, for unless there was the fullest possible disclosure the fund could not be traced. Lord Denning said at p 358:

> The plaintiff, who has been defrauded, has a right in equity to follow the money. He is entitled, in Atkin LJ's words, to lift the latch of the bankers' door: see *Banque Belge pour L'Etranger v Hambrouck* [1921] 1 KB 321 at p 335. The customer, who has prima facie been guilty of fraud, cannot bolt the door against him. Owing to his fraud, he is disentitled from relying on the confidential relationship between him and the bank: see *Initial Services Ltd v Putterill and Another* [1967] 3 All ER 145 at p 148, [1968] 1 QB 396 at 405. If the plaintiff's equity is to be of any avail, he must be given access to the bank's books and documents, for that is the only way of tracing the money or of knowing what has happened to it: see *Mediterranea Reffifieria Siciliana Petroli SpA v. Mabanaft GmbH* [1978] Court of Appeal Transcript 816. So the court, in order to give effect to equity, will be prepared in a proper case to make an order on the bank for their discovery. The plaintiff must of course give an undertaking in damages to the bank and must pay all and any expenses to which the bank is put in making the discovery; and the documents, once seen must be used solely for the purpose of following and tracing the money, and not for any other purpose. With these safeguards, I think the new jurisdiction, already exercised in the three cases I have referred to, should be affirmed by this court.

[32] I am of the view that it is positively unjust for a defendant to be able to plead crimination in order to escape revealing the whereabouts of the plaintiff's property which he had no business to have in his possession in the first place.

As such, the so-called privilege, if any, must yield to a plaintiff's proprietary claim. Here I need do no more than to quote from the speech of Lord Templeman in *AT & T Istel Ltd and another v Tully and others* [1992] 3 All ER 523 at p 350:

> It is difficult to see any reason why in civil proceedings the privilege against self-incrimination should be exercisable so as to enable a litigant to refuse relevant and even vital documents which are in his possession or power and which speak for themselves. ... I regard the privilege against self-incrimination exercisable in civil proceedings as an archaic and unjustifiable survival from the past when the court directs the production of relevant documents and requires the defendant to specify his dealings with the plaintiff's property or money.

[33] Lord Griffiths in his speech in *AT & T Istel Ltd and another v Tully and others* said (at pp 533–534):

> My Lords, the privilege against self-incrimination is in need of radical reappraisal. It is however deeply embedded in English law and can only be removed or moderated by Parliament. As the speeches of your Lordships show, Parliament has in recent years made many inroads into the privilege in a number of statutes. In civil actions, as this appeal demonstrates, the privilege can be claimed to thwart the claims of victims of fraud. I can for myself see no argument in favour of the privilege against producing a document the contents of which may go to show that the holder has committed a criminal offence. The contents of the document will speak for itself and there is no risk of the false confession which underlies the privilege against having to answer questions that may incriminate the speaker. The rule may once have been justified by the fear that without it an accused might be tortured into production of documents but those days are surely past and this consideration cannot apply in the context of a civil action. I therefore associate myself with Lord Templeman when he says (see p 530, *ante):*
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> > I regard the privilege against self-incrimination exercisable in civil proceedings as an archaic and unjustifiable survival from the past when the court directs the production of relevant documents and requires the defendant to specify his dealings with the plaintiff's property or money.

[34] Premised upon the cases referred to above, it is my view that it follows that a defendant in proceedings for tracing of property cannot refuse to disclose relevant and vital information which is in his or her possession or power. In the instant appeal, there is no foundation whatsoever to base a claim to privilege against self-incrimination by the defendants. The claim to privilege against self-incrimination in the instant appeal has as much to do with the facts of this case as chalk has to do with cheese. There was at all material times a fiduciary relationship between the plaintiff and the first defendant. The other defendants are merely recipients of trust property. The claim to privilege against self-incrimination is irrelevant as it is inapplicable to a claim by the owner of the property to his property. It is for these reasons that the appeal must be allowed with costs the effect of which would be that the second to the fourth

defendants shall respectively by way of an affidavit provide a detailed account of to whom and where the sum of RM27,606,169.65 was subsequently disbursed to. The deposit is to be refunded to the plaintiff.

[35] I find it unnecessary to answer the two questions posed as I am of the view that under the circumstances of the instant appeal, they were not properly framed.

[36] My learned brothers Alauddin Mohd Sheriff PCA and Augustine Paul FCJ have seen this judgment in draft and concurred with it.

Appeal allowed with costs.

Reported by Ashok Kumar